

# INDIA: “A feeble no may mean yes”: Indian court overturns rape conviction

*Activists say Delhi high court's decision in case of film director Mahmood Farooqui sets a worrying precedent on consent.*

By Michael Safi

The Guardian (26.09.2017) – <http://bit.ly/2y7UsNy> – An Indian court has overturned a rape conviction against a film director, ruling that a “feeble no” can signal consent, especially in cases where the alleged victim is well-educated.

Women’s rights activists said the decision “muddies the water” around consent in a country struggling to curb high levels of sexual violence, rampant street harassment and deeply entrenched patriarchal attitudes towards sex.

Mahmood Farooqui was sentenced to seven years in prison in 2016 for sexually assaulting an American postgraduate student while she was visiting his home in Delhi.

The woman claimed Farooqui, the co-director of the 2010 Bollywood film *Peepli Live*, forced himself on to her while drunk, ignored her when she repeatedly said no and restrained her arms when she tried to prevent him from removing her clothes.

Appealing against the decision in Delhi’s high court, lawyers for Farooqui argued that the encounter never took place and that if it had, he had not been aware the victim did not consent.

Justice Ashutosh Kumar overturned the conviction on Monday, concluding he had to give “the benefit of the doubt” to

Farooqui on both arguments.

He found it was unclear whether Farooqui had known the alleged victim did not consent because, even though she testified that she had repeatedly said no to his advances and tried to physically resist, she accepted she had ultimately gone along with it.

“Instances of woman behaviour are not unknown that a feeble no may mean a yes,” he said.

Karuna Nundy, a supreme court lawyer who advised on India’s most recent reform of sexual assault laws, said she was concerned about the precedent the judgment set.

“It muddies the waters and will confuse a lot of the issues around consent,” she said. “What the law says is that consent may be silent, it may be non-verbal, but it has to be unequivocal. And so when somebody says no – even when you think it’s feeble – and there is no subsequent unequivocal yes, then there is no consent.”

The alleged victim told the court she stopped resisting out of fear she could be harmed in the same manner as a Delhi physiotherapy student whose rape and murder in 2012 sparked international protests. Farooqui only released her when she feigned an orgasm in order to persuade him to stop, she said.

The judge said the alleged victim’s conduct would have sent Farooqui a message that she consented, “even though wrongly and mistakenly”.

“What [Farooqui] has been communicated is ... that the [alleged victim] is OK with it and has participated in the act,” he said.

The judge argued that “in an act of passion, actuated by libido,” consent could be complex, “and it may not necessarily always mean yes in case of yes or no in case of no”.

He said a firm no was not necessarily required in cases where the people involved were strangers, "in some kind of prohibited relationship" or if one of the parties was "a conservative person".

"But [the] same would not be the situation when parties are known to each other, are persons of letters and are intellectually/academically proficient, and if in the past there have been physical contacts," he said.

"In such cases, it would be really difficult to decipher whether little or no resistance and a feeble no was actually a denial of consent."

The Times of India criticised the decision in an editorial, arguing that the court may have "set a potentially dangerous precedent that a no does not always necessarily mean no".

It said: "It is easy to see defence lawyers lapping this up in cases of rape and other sexual offences even where there the alleged victim has explicitly said no to argue that the accused may not have perceived it as a firm no. It is a slippery slope the court should have avoided stepping on to."

Vrinda Grover, the lawyer for the alleged victim, said the decision was "dishonest in law and fact". An appeal will be filed in the Indian supreme court.

It is the second legal decision to draw outrage in recent days, after three law students were granted bail last week while appealing against a sexual assault conviction from March.

The students were convicted of using nude photographs of a woman to blackmail her into having sex with them over an 18-month period. Releasing the students on bail, the Punjab and Haryana high court said the victim's behaviour could be interpreted as a "misadventure stemming from a promiscuous attitude and a voyeuristic mind".

The court said her story did not “throw up gut-wrenching violence that normally precede or accompany such incidents”.

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